LIBRARY
SUPREME COURT, U. S.

FILED
JAN 9 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 74-283

EMPIRE CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

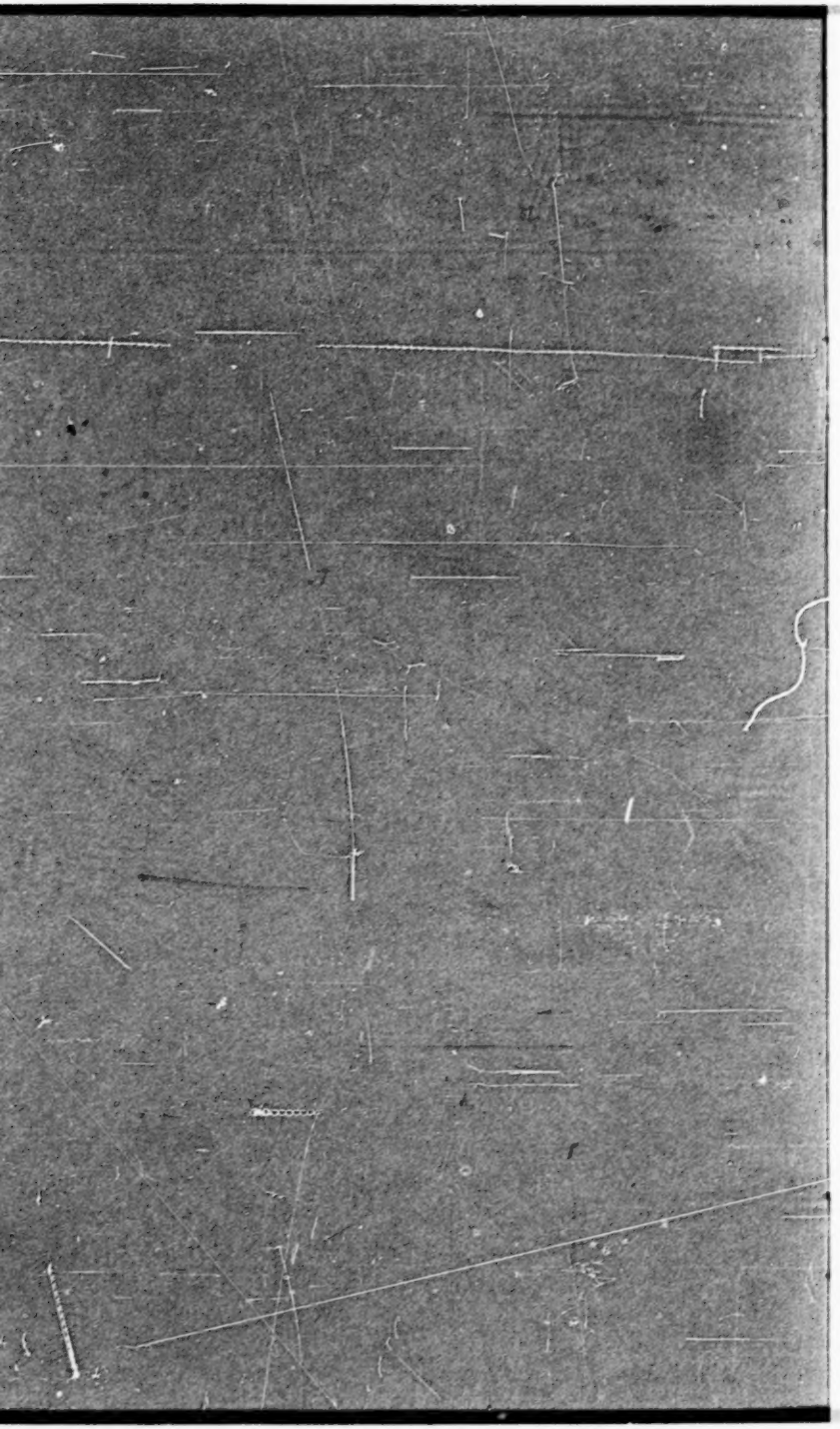
On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

E. BARRETT PRETTYMAN, JR.
815 Connecticut Ave., N.W.
Washington, D.C. 20006

HERBERT J. MILLER, JR.
NATHAN LEWIN
1320 - 19th Street, N.W.
Washington, D.C. 20036
Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.



IN THE

Supreme Court of the United States

No. 74-283

EMPRISE CORPORATION, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

The Solicitor General's Brief in Opposition, which was due to be filed (after an extension of time) on December 12, 1974, was not received by counsel for Emprise Corporation until more than three weeks later, on Saturday, January 4, 1975. The case has nevertheless been placed on the Court's calendar for the conference of January 10. We respectfully submit that petitioner cannot adequately answer, and the Court could not adequately consider, the many points raised by the Solicitor General's brief in the few days between the receipt of his brief and the conference.

We will nevertheless attempt to answer in abbreviated form a few of the major points raised by the Solicitor General.

1. The Solicitor General treated quite cavalierly, in a few paragraphs, the issue of the scope of The Travel Act.

In an attempt to make the alleged violation of the Act involved here seem as far-reaching and pervasive as possible, the Government repeatedly speaks of that violation in terms of the "distribution of proceeds" from an illegal activity. Brief in Opposition at 2, 6, 7. The Court of Appeals, however, did not view the case in that light. It thought the illegality lay in the fact that "the interests" which two persons allegedly had in legal gambling conducted at the Frontier Hotel in Las Vegas "were hidden from the Nevada gaming authorities." App. 6a; see also App. 10a-11a, 12a. The Government and the Court of Appeals cannot both be right.

Moreover, the Government candidly admits that under its view, "the seriousness of the state offense is * * * irrelevant under the Travel Act * * *." Brief in Opposition at 7.[1] As we pointed out in our petition

---

[1] The Government attempts to distinguish *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973), on the ground that that case "involved corruption in a local prosecutor's office and had no interstate aspects." Brief in Opposition at 8 n. 5. The Government's characterization simply is not accurate. The prosecution in *Archer* proved three uses of interstate facilities directly connected with the alleged crime. The court found these uses either Government-inspired or too incidental to make a federal crime out of what was essentially local corruption

The Government also says in this section of its brief that "no question concerning petitioners' failure to obtain licenses individually" was involved in the case. *Id.* The Court of Appeals thought otherwise. It described "the Government's contention

(p. 11), this approach can make a federal crime out of having one instead of three fire exits in a gambling casino, or in requiring employees of such a casino to work on twelve-hour shifts.

Exactly the opposite approach to the Travel Act has been taken by the District of Columbia Circuit in a case decided after the filing of our petition. *United States* v. *Lightfoot*, No. 73-1785, October 18, 1974. In that case the defendant was charged with and convicted of a wide variety of offenses, including pandering, violating the Mann Act, and receiving stolen property, as well as with violating the Travel Act. Even though the defendant had purchased a car with funds derived from prostitution and driven the car interstate, and even though the Travel Act prohibits "distribut[ing] the proceeds of [an] unlawful activity," Judges McGowan, Edwards and Tamm refused to find a violation of the Act. They held instead that the word "distribute" in the Act "carries a connotation of distribution of illegal proceeds to persons in organized crime conspiracies." Slip Opinion at 7. Such a construction would have precluded any conviction of the defendants in the instant case under the evidence and the instructions to the jury, even if the Government were correct that a "distribution of proceeds" is the key to the offense.

2. The Government concedes that the opinion in *United States* v. *Carter*, 311 F.2d 934, 941 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963), conflicts with the de-

---

[as being] that all persons with a direct or indirect interest in a gambling casino must be licensed. We find no such requirement in Nevada law." *Id.* at 11a; footnote deleted. More importantly, the Government contended both in the indictment and in its closing argument to the jury that the violation lay in the failure to obtain gambling licenses. 39 R.T. 7902-94, 43 R.T. 8693-95.

cision below on the question of corporate liability for acts of an acquired corporation. It insists that what the court said in *Carter* "did not form the basis of its decision" (Br. in Opp. 20). The fact is, however, that what the court said was nothing less than an alternative holding.[2]

More important than any conflict with *Carter*, however, is the total irreconcilability of the decision below with basic principles which this Court has insisted upon for vicarious liability even in areas requiring less constitutional vigilance than the criminal law. For successor liability under the National Labor Relations Act, the Court in *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973), required "knowledge [by the buyer] that the wrong remained unremedied" as a precondition for liability. 414 U.S. at 180; *see also* 414 U.S. at 182-183 n.5.

This issue, moreover, is critical for Emprise and has significance in many States beyond New York. Already, petitioner's subsidiaries have lost a liquor license in Oregon, lost a concession in Illinois, and seen interests in Arizona racetracks placed in trust as a result of this conviction. See *In re Petition for Rehearing of East St. Louis Jockey Club, Inc.*, 5 CCH Trade Reg. Rep. ¶ 50,165, at 55,291-92 (Ill. Racing Bd., Feb. 23, 1973). Statutes with phrasing identical or similar to the New York Corporation Law in this case exist in several States. Connecticut tracks New York's "liabilities,

[2] The Government also attempts to distinguish *Carter* on the ground that there the corporation was itself charged with a crime and the evidence was insufficient, whereas here Emprise was guilty because charged as a successor corporation.. This position leads to the extraordinary result that Emprise could not have been convicted if charged itself but can be convicted if not charged itself and if the evidence related entirely to another company.

obligations and penalties" wording. Conn. Gen. Stat. Ann. ¶ 33-369(e) (Cum. Supp. 1973). And Delaware, Kansas and Nevada, to give further examples, all use a phrasing subject to similar interpretation—"restrictions, disabilities and duties." 8 Del. Code Ann. § 259(a) (Cum. Supp. Pam. 1968); Kan. Stat. Ann. § 17-6709 (Cum. Supp. 1973); Nev. Rev. Stat. § 78.495(1) (1973).

The question, in sum, is fully worthy of this Court's attention. We are reminded of the observation of Mr. Justice Story in a letter to Charles Sumner after a Circuit Justice had held that corporations could not do business outside their State of incorporation:

> My brother, McKinley, has recently made a most sweeping decision in the circuit court in Alabama which has frightened half the lawyers and all the corporations in the country out of their proprieties. [2 C. Warren, *The Supreme Court in United States History* 324 (1922).]

A second and better thought reversed that decision. *Bank of Augusta* v. *Earle*, 38 U.S. (13 Pet.) 519 (1839).

3. We must take cognizance of the assertion by the Government that "It was within the trial judge's discretion to question jurors privately about the possible effect of prejudicial publicity in order to reduce the adversary atmosphere that the presence of six defendants and their counsel would have created." Brief in Opposition at 10. We need only say that this is an entirely new and shocking assertion, directly contrary to the authority cited in our petition and to traditional constitutional doctrine. We also note that it is totally unsupported by any authority cited by the Solicitor General.

In the single case referred to by him, *United States v. Jorgenson,* 451 F.2d 516, 520-521 (10th Cir.), *cert. denied,* 405 U.S. 922 (1972), the entire transcript of the conversation between the court and a single juror was immediately read to counsel and defendants. Defense counsel not only failed to object but explicitly stated that he had no objection to the juror remaining on the panel. *Id.* The court quoted the rule to be that " 'we can let stand no conviction where the defendant was not present at all stages of the proceedings unless the record completely negatives any reasonable possibility of prejudice arising from such error.' " *Id.* That is not this case.

4. Because of the time strictures imposed upon us, we must rely upon our petition to answer the remaining points in the Solicitor General's brief.

Respectfully submitted,

E. Barrett Prettyman, Jr.
815 Connecticut Ave., N.W.
Washington, D.C. 20006

Herbert J. Miller, Jr.
Nathan Lewin
Washington, D.C. 20036
1320 - 19th Street, N.W.

Attorneys for Petitioner